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## POLICY FORMATION BY THE CIVIL AERONAUTICS BOARD\*

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### *POLICY DEVELOPMENT BY CAB PROPER*

#### 1. MEMBERSHIP OF BOARD

THE Civil Aeronautics Board has been made up of 14 men with very different backgrounds.<sup>1</sup> Six members have been lawyers, two engineers and the others business executives, government career men and politicians. One member had formal training as a transportation economist, several had administrative regulatory experience with other agencies. Four have been pilots, two were World War I military pilots, of whom one held an early transport license. Of the others, one was a commercial and one a private pilot, and one took out a student certificate after taking office.

The different temperaments of the members have been reflected in the functioning of the CAB. Cautious members have hesitated to certificate routes without proven economic potentials, and other members consistently favored expansion of route authorization regardless of cost or amount of competition. On many major policies members occasionally are unable to reach unanimous agreement but proceed with a course of action whenever a majority is in agreement.<sup>2</sup> The differences

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\* This article presents in slightly edited form the contents of Chapters VI, VII, VIII and XIX of the Staff Report on the Civil Aeronautics Board to the Committee on Independent Regulatory Commissions to the Commission on Organization of the Executive Branch of the Government, September-November, 1948.

<sup>1</sup> During its ten years of existence the Board has had fourteen members who, excluding the two most recent appointments, have served on the Board from ten months to ten years and have averaged nearly 4½ years in office. Until May 1948, two members had served since its beginning and one still serves. These members, plus the more permanent staff, have given the Board some continuity in expertness.

<sup>2</sup> The *Western-United Acquisition of Route 68*, 8 CAB 298 (1947) and the *Latin American Air Service* case, 6 CAB 857 (1946) are discussed in Appendix III to the Report, to illustrate the divergence of philosophies among CAB members which makes unanimous agreement difficult to obtain.

of opinion among CAB members have frequently caused protracted delays in Board decisions. At times a member has found it impossible to make up his mind and has held up a decision pending further deliberation or submission of additional information or possibly a sounding of industry sentiment.

New members have never hesitated to participate in decisions upon taking office regardless of the extent of their aviation background.<sup>3</sup> Continuity of policy appears to come from the staff which, with few exceptions, does not change with the turnover in Board membership.

## 2. CHAIRMAN OF THE BOARD

Although his tenure of office as a Board member may be for six years, the chairmanship is a year-to-year appointment. By statutory directive, the Chairman is designated annually by the President. There have been six chairmen. With the exception of the term of Mr. L. Welch Pogue, who was chairman for 53 months during the war years, length of tenure of the chairman has averaged 15 months. On four occasions the chairmanship has been vacant for periods ranging from a few days to three months.<sup>4</sup>

In addition to his regular duties as a Board member, including presiding at oral arguments, Board meetings, and the like, the Chairman has a variety of additional duties. Usually, he is the Board's spokesman before Congressional committees in testifying on legislation and appropriations. He receives a substantial number of visits and telephone calls from members of the industry, of the legislative and executive branches of government, and from those who simply have an interest in aviation.

The Chairman's Office also has certain additional responsibilities, such as the handling of all important incoming mail, the preparation of the calendar of topics for Board meetings, a general surveillance over the progress of work in process by the staff. This latter important responsibility consumes a considerable share of the time of the Chairman's Administrative Assistant. In August 1948, the Chairman began the practice of holding weekly staff meetings with bureau chiefs. Other Board members attended the first staff meeting.

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<sup>3</sup> On six occasions, for periods ranging from one to five months, the Board has lacked one member, and at one time for a period of three months, Board membership totaled only three persons. Since October, 1947, there have been two resignations and one instance of failure to reappoint. Consequently, the Board in the second half of 1948 was composed of three relatively new men, one of whom came up from ten years on the Board's staff and therefore was familiar with its proceedings.

<sup>4</sup> Until recently all Board members, including the Chairman, received the same salary. Under present appropriations, the Chairman receives \$500 per annum more than the other members. Since the increase was granted by Congress in the absence of a request in the Board's budget justification it shows a tendency on the part of Congress to accord some distinction to the Office of Chairman of the Board.

In a very real sense, therefore, the Chairman of the Board is its chief executive officer. However, due to annual appointment and frequent changes of Chairman there has been little opportunity for the development of a strong leader type of chairman. In practice, there has been little continuity in over-all policy determinations emanating from the chairmanship. It would be difficult to demonstrate that the Chairman is more influential in policy determination than is any other member of the Board.

The extent of influence exerted by the Chairman is dependent upon his personality. With one recent exception, Board chairmen have shown a tendency to be easy-going and capable of maintaining full staff and Board cooperation. As a result, their policies have been one of compromise in deference to their fellow Board members. On the other hand, one recent Chairman by persuasion rather than compromise made vigorous endeavors to influence the opinions of other members of the Board, with the result that serious disharmony broke out among the members.

Some members of the Board are quite jealous of the position of the Chairman and endeavor to maintain a basis of strict equality for all five members of the Board. This fact evidenced itself recently when the salary of the Chairman was increased to \$500 more than that of any other member. This jealousy was also partially responsible for the ill will which developed during one recent Chairmanship.

### 3. METHOD OF OPERATION

The Board meets constantly. Except on the days when the CAB hears oral argument in formal cases, it holds executive sessions, which usually consume the greater portion of the day. While the Chairman presides in a businesslike manner, other members of the Board frequently take the initiative in directing discussion. The Board, unlike the ICC and other regulatory agencies, neither divides responsibility for its functions among its members nor allocates to staff bureaus under the direction of one or two of its members certain types of regulation and Board responsibilities.

The Bureau of Administration of the CAB circulates memoranda to members of the Board for approval by notation. All matters which require the issuance of orders or opinions under the name of the Board become Board action when unanimously approved by notation, and are designated as such in the minutes of the Board. The notation procedure is used with respect to opinions which have been agreed on in principle and require only formal approval; this substantially reduces the volume of routine items that must be taken up at Board meetings. If a member does not approve of a matter circulated for notation, he requests that it be placed on the Board's calendar for discussion.

The Office of the Chairman is responsible for preparation of the Board's calendar and for the selection of policy determinations which appear thereon. In addition to notation items placed on the calendar at members' request, the calendar contains all important subjects which require full Board discussion. Board members who are interested in any particular case request that the item be given priority. This is more often the rule than the exception as the Board's calendar is quite flexible.

Unless procedural matters require a ruling by the Board, members do not participate in most formal proceedings until oral argument. The complete record is furnished them several weeks before and includes the transcript of the hearing before a Hearing Examiner, his comprehensive report and recommendations, applicant's exceptions thereto, and briefs in support of the respective contentions. To assist members in readily understanding the issues involved in the case, the Examiner prepares a short memorandum listing the issues that the several applicants have raised by their exceptions to his report.

The amount of advance study that each member gives the record before oral argument differs extensively among the individuals. Some members are said to read only the Examiner's memorandum. Other members have shown remarkable familiarity with the detailed record in cases and in precedents of the Board. During the past year the Board has heard so many oral arguments on cases based upon voluminous records that it would be humanly impossible for them to give careful attention to a great portion of the transcripts.

In proceedings in which oral argument is not heard the Board proceeds to a determination upon the basis of the record, memoranda prepared by its staff, and advice of their individual administrative assistants.

The Board members themselves resolve policy issues through discussion in Board meetings. In all proceedings the members rely upon the record as developed by its staff and upon memoranda and verbal explanations given it by staff members primarily interested in the question being adjudicated.

Notation items are officially approved as a matter of course along with other routine business at the outset of formal Board meetings. A member of the Chairman's Office maintains a check list of key staff personnel who are to be notified when certain types of policy determinations are placed on the calendar for discussion. In this manner all persons who are qualified to enter into a discussion before the Board are advised to be present.

After a case has been placed on the Board's calendar for discussion, Board members frequently request additional information concerning the issue before them, sometimes from their personal assistants, but more often from staff members of the bureaus most closely connected

with preparation of the case involved. On occasion Board members circulate memoranda containing their viewpoints on a policy question either to obtain comment from other Board members or to stimulate discussion at Board meetings.

At times the Board's Special Advisor and other staff members have presented memoranda after the Board has reached a decision on a given matter. The present Chairman, however, has directed that this procedure be discontinued and it is now customary for the Board to invite opinion from its staff only prior to its making a final decision.

In general, the Board has contented itself in choosing between opposing contentions and has not undertaken to pursue alternative courses of action. There are notable exceptions. In the *United Western Acquisition of Route 68* the majority opinion directed United to charge off against its capital surplus account the price paid for the route in excess of the value of physical assets received in transfer.

After the Board has reached a decision the proper staff section (Hearing Examiner — route cases; Economic Bureau — rate cases, etc.) is directed to prepare the Board's opinion. Dissenting and separate opinions are usually prepared in the office of the member exercising the privilege of independent expression. Administrative assistants are usually responsible for the preparation of separate opinions.

Notwithstanding the extensive use of the notation procedure, the Board probably spends more time in Board meetings than do other regulatory agencies.

*Distribution of Board's Time Spent in Board Room Meetings for Three-Month Period, March 1, 1948 to May 31, 1948*

Number of work days in period .....	64
Number of oral arguments .....	6
Number of days spent in oral arguments.....	8
Number of meetings (each meeting equals ½ day) .....	53
Total number of days spent in Board Room during period.....	35
Percentage of days in period spent in Board Room during period	54.7

*Matters Considered at Board Meetings for Three-Month Period  
March 1, 1948 to May 31, 1948*

Item	Percent Time Spent
Administrative .....	2
Certificate cases, including permits .....	46
Rate cases .....	24
International matters — agreements.....	7
Other formal proceedings .....	7
Civil air regulations .....	9
Accident reports .....	5
Total .....	100

The following table of notation items indicates the variety of matters handled in this manner during a three-month period.

*Types of Notation Items Handled March 1, 1948 to May 31, 1948*

Item	Number	Percent
Certificates and Permits .....	85	29.2
Rates .....	50	17.2
Agreements (including IATA) .....	34	11.7
Suspension and Revocation Cases .....	20	6.8
Miscellaneous Matters .....	19	6.5
Administrative Matters .....	18	6.2
Legislation .....	16	5.5
Interlocking Relationships .....	14	4.8
Civil Air Regulations .....	13	4.5
International Matters .....	11	3.8
Accident Reports .....	11	3.8
Total .....	291	100.0

#### 4. MANNER OF REACHING BOARD DECISIONS

In order to get a clear picture of the manner in which the Board reaches policy decisions, it is necessary to break down the scope of the Board's activities into several categories. As a general rule the Board reaches decisions with respect to economic aspects of air transportation within the framework of pending cases.

##### *Route Cases*

Board members take a keen personal interest in new route proceedings, possibly because of the political aspects involved in decisions which directly affect the economic welfare of various communities and large corporations such as the airlines. These proceedings involve determination of broad issues of public convenience and necessity, the proper degree of competition, the need for one plane service, the effect of diversion of traffic and the selection of a carrier.

In dealing with these nebulous policy concepts, the Board is aided by its Examiner's recommendations and advice of its Special Economic Advisor. The Economic Bureau is seldom called upon for assistance but may furnish basic traffic flow information. The General Counsel assists primarily on legal issues and in pointing out precedents, but occasionally assists in the policy determinations.

In the case of new route certifications the Board's policy has evolved from case-to-case as exemplified by the Board's philosophy of competition. No general formulas or standards exist to show whether or not competition should or should not be instituted over a given route. The Board considers traffic data and type of service being rendered, but does not have a clear policy statement on the question of competition, although many aspects of the evolution of Board policy can be traced through Board decisions. Considerable, but by no means total, reliance

is placed by Board members upon the Examiner's report. Oral argument in new route cases by the parties is also important.

By and large there is no specialization in route cases as among members. Each member participates fully, if present, in the case under discussion. They generally rely upon their administrative assistants to analyze the voluminous record and briefs. Because of the nature of route proceedings, and because of the continuing work of members and their assistants upon route matters, it is probable that staff recommendations are substantially less important in this field than they are in the balance of the economic field.

#### *Air Mail Rates*

In the field of mail rates staff, policy recommendations have been of greater importance, and this has increased with the institution of the rate conference method. On the basis of informal conferences between the staff and representatives of the carriers, substantial agreement on underlying facts and accounting methods have thus far been reached. With this conference material the staff prepares a tentative statement of findings and conclusions which is submitted to and discussed by Board members. Such statements are replete with details about the rate in question and its underlying policy. Although this statement receives careful consideration, it sometimes happens that only the financial aspects and result of the rate proceeding are discussed by the Board and that the underlying policy considerations are assumed.

In the field of rate policy, it may be said that the staff plays a dominant part in the Board's action, subject to a general surveillance by members. Policy on passenger and cargo rate matters also stems principally from staff recommendations, although here again the Board exercises continuing surveillance. The recent chairman participated actively in the formulation of general rate policies as did the member recently appointed upon the staff. Policy on mergers, consolidations and control of carriers, however, is developed primarily by the members, being comparable to route policy.

#### *Safety Regulation and Investigation*

With respect to safety matters, Board policy is based upon staff recommendations to a very considerable extent. This is true both in the formulation and promulgation of the Civil Air Regulations and also in connection with such policy matters as arise from accident investigation reports. Nearly half of the Board appointees have been lawyers, and only coincidentally technicians or engineers. Accordingly, the Board relies heavily upon the work of the staff in both safety regulation and accident investigation fields, and almost exclusively on the safety regulation staff on policy matters which do not involve economic or legal problems. However, the Board proper has, on occasion exercised editorial restraint on its staff in criticizing the CAA and the air



carriers in the Board's accident investigation reports so as not to jeopardize public confidence therein.

With respect to safety regulations which cut across the legal and economic fields, the Board acts, for the most part, as an arbiter between the various interests, weighing the safety aspects on the one hand with legal and economic considerations on the other, as presented by the staff.

For example, in the case of such items as the recent promulgation of the flight engineer rule, the possible repeal of Article 41 of the International Civil Aviation Convention had to be considered. Each one of the various staff bureaus presented its point of view and the Board then reached a decision. Probably no agency, either a board or a single administrator, who did not have access to all points of view in such far-reaching matters, could reach a sound decision.

##### 5. DIVISION OF WORK AMONG MEMBERS

The CAB has not adopted the principle of assigning a particular proceeding to an individual member to supervise and there has been little tendency among members to develop expertness in types of cases. There have been occasions when a decision involved a complicated legal issue and a member of the Board having legal training was requested to supervise preparation of the opinion for the Board.

A few years ago the Board informally designated pairs of its members to supervise each of its principal Bureaus. This arrangement appears not to have been rigidly pursued and is no longer in effect. One member took a special interest in administrative problems over many years on an informal basis. Another member has been formally designated liaison representative with state governments and state aeronautical agencies, but has been given no real responsibilities. The Board designates individual members to represent it at conferences, conventions and meetings.

One of the early members was a brilliant aeronautical engineer and assumed direction over the Board's safety regulatory policies and accident investigation procedures. Since his time no Board member can be said to have been thoroughly conversant with the technical aspects of aviation regulatory policies.

The Board member designated to act as its liaison representative in federal-state matters has dealt generally with the propriety and scope of state economic and safety regulations and state safety enforcement problems. A former member of the Board with an engineering background was the Board's representative on the CAA-CAB Coordinating Committee for improving inter-agency relations in the field of safety regulations although, in fact, this committee never met. Its work has been handled by its sub-committee during his tenure.

Except in the case of Air Coordinating Committee activities, of which the CAB Chairman is its Chairman, and another member is the Board's representative on the Industrial Division of ACC, and in the field of state and local relationships, there is now little approach to specialization by members of the Board.

#### 6. EXPEDITION AND DELAY IN BOARD BUSINESS

The very considerable length of time taken by the Board to process various types of cases has been tabulated in Chapter IV dealing with Work Load and Time Factors. There are several main reasons for Board delay: (1) after a matter has been processed to the Board level, the members cannot always make up their minds and reach a decision; (2) after the Board has reached a decision and ordered its opinion to be written, a delay occurs at the staff level in preparation of the Board order and opinion; (3) before reaching the Board the preparation of draft opinions for Board consideration are sometimes unduly delayed in the process of staff coordination between the several Bureaus which have different professional approaches.

The Board has endeavored to institute corrective measures. It is now customary for the Board to order a majority and dissenting opinion to be written with the designation of which is the dissenting opinion depending upon final alignment of Board members with the varying points of view. In other words, a staff member will write an opinion presenting a given point of view and not indicate whether it is expressing the Board's majority or minority view.

The Chairman's office has attempted to correct the second reason for delay by setting time limits within which staff members must prepare Board orders and opinions. The Bureau directors are responsible for maintenance of work progress in their respective bureaus. As a result, if the person to whom the task of writing the opinion has been allocated falls behind in his work, it is the responsibility of the director of the bureau or section head to furnish personnel to assist the original scrivener or to assign the job to someone else in order to meet the deadline.

The period of Board deliberation is lengthened in those cases in which, because of the disqualification or resignation of a member, there is an even split between majority and minority view and no opinion can be issued representing the view of a quorum of the Board. These deadlocks are rare and eventually are resolved but there seems to be no method by which the length of period of time of deliberation can be shortened.

Board deliberation is also protracted when an important proceeding is considered when one member is temporarily away — and frequently one member is necessarily away attending an international or other meeting. In such cases it often becomes necessary to reopen

deliberations and review compromises agreed upon in order that the absent member may participate in the final decision. This has at times caused serious delays. Oftentimes, during these deliberations, the Board will request that additional information be furnished it by staff units. In addition, members of the staff often seek to reassert their positions when they see that the Board is in a deadlock or that members are wavering in their opinions.

#### 7. ADMINISTRATIVE ASSISTANTS OF MEMBERS

The administrative assistants of the various Board members carry on the functions of confidential and technical assistant and their importance and influence is considerable. They are called upon to brief the members on items on the calendar and items circulated for approval by notation, to digest the records, to carry on special research, to write opinions, especially dissents and to make recommendations concerning many of the routine items which require approval by members.

Depending upon the individual member, his personality and capabilities, the administrative assistant does or does not play an important part in the formulation of Board policy. In the past, administrative assistants, through the reliance placed in them by some Board members, have not only written Board opinions, but in so doing, have expressed what was essentially their own point of view.

#### STAFF PARTICIPATION IN CAB POLICY DETERMINATION

##### 1. GENERAL RELIANCE ON STAFF

Route policy determinations are made at the Board level by members in Board meetings. Other Board decisions are frequently technical and in such instances, because of the expertness of the personnel involved, members rely heavily upon recommendations of the staff. This is especially true in the fields of safety regulation and enforcement, accident investigation, determination of mail rates, and certain aspects of economic regulations.

For example, determination of air mail compensation involves a detailed analysis of carrier accounts, and a comparative analysis of operating efficiency. The show-cause order issued by the Board in these matters is prepared by the staff and considered carefully by the Board. Subsequently the Board deliberates only upon broad issues of policy raised by staff memoranda or by exceptions taken by the carrier to the show-cause order.

Another example of reliance upon the staff arises with respect to the promulgation of technical amendments to the Civil Air Regulations. Here the Board of necessity relies upon the aeronautical engineers on its staff. The same is true of the determination of causes of aircraft accidents.

The special Economic Advisor to the Board is available for consultation. Organization-wise, he is independent of the bureaus and is a part of the Office of Board Members proper. All matters on the Board's agenda, notation items and items for discussion at Board meetings pass over his desk. As a qualified economist, he exercises his privilege to advise the Board in economic matters. His position is one of passive observer so long as the Board functions within the limits of sound economic policy.

If the Board must make a policy determination involving a decision between two economic theories, it may call upon its Special Advisor for his opinion regarding the matter or he may, on his own initiative, prepare material for the Board which he feels will assist them in their deliberations.<sup>5</sup>

## 2. BUREAU OF ECONOMIC REGULATION — POLICY FORMATION

Generally speaking, this bureau maintains technical competence in the fields of economic analysis and accountancy. The bureau recruits specially qualified personnel who collect for the Board a large amount of financial and economic data which undergoes a constant process of review, compilation and analysis. Accordingly, it is logical that the Board should look to the Bureau of Economic Regulation for both compilation and interpretation of economic data and recommendations in the formulation of policies relating to the economic regulation of air transportation.

The participation of the bureau in policy formation concerning economic regulatory problems has varied considerably according to subject matter and to the manner in which the particular problem has arisen for Board action. Thus, traditionally, the bureau has had very little to do with the issuance of certificates of public convenience and necessity. Issues relating to these awards are tried out in formal administrative proceedings involving examiners' reports, briefs and oral argument before the Board. In contrast to this practice, however, the bureau has always played a major role in the study, processing and determination of issues relating to mail compensation.

The bureau's advice leading toward the formulation of policy is tendered to the Board in two general ways. In the first place, staff members of the bureau daily transmit to the Board for action, formal or informal, written memoranda, embodying recommendations or accompanied by drafts of orders, letters, releases, regulations, etc. In the second place, representatives of the bureau, usually the Director, the Assistant Directors, or the chiefs of the various divisions make oral

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<sup>5</sup> So far as final policy is concerned his function is purely advisory. Thus in *Western-United Acquisition of Route 68*, cit. note 1, his memorandum on the inadvisability of permitting a valuation to be placed on an air carrier certificate was used in the preparation of the dissenting and not of the majority opinion.

comment and recommendations to the Board in the course of calendar and other Board meetings.

### *Participation in Policy Classified by Types*

The bureau plays a substantial part in Board policy formulation in dealing with four types of matters.

*Routine.* The first, and most significant in point of work volume, is represented by those matters which are routinely processed in the first instance by the Bureau of Economic Regulation and then presented in writing to the Board. Examples of matters processed in this fashion include: show cause orders in mail rate cases, prepared following the filing of petitions by carriers; recommendations concerning approval or disapproval of interlocking relationships or inter-carrier agreements; and recommendations concerning negotiation of bilateral agreements for transmittal to the Department of State.

*Requests from Board.* A second arises when the bureau participates in Board action through the request for advice by the Board. Most often this type of matter would be an economic problem which has arisen collaterally in another type of proceeding. An example would be the analysis of economic implications of a particular proposed safety regulation.

*Formal Proceedings.* A third type occurs in connection with a formal proceeding in which the record presented to the Board contains testimony or exhibits given or prepared by experts in the Economic Bureau and introduced into evidence during the hearing as part of the case presented by Public Counsel. Examples of this method of the bureau's participation in policy formation are the expert statements introduced in mail rate hearings and the testimony of the bureau's tariff experts in formal investigations or particular tariff rules.

*Delegated Authority.* The fourth type of matter is that which is handled entirely by the staff under delegation of authority from the Board. In this type, of course, the formation of policy is relatively limited, since the theory of the delegation of authority includes the hypothesis that the policy is already well defined. Examples would be the grant or denial by the Director of the Economic Bureau of applications by the carriers for permission to file changes in tariffs on other than statutory notice and the waiving by the Director of reporting requirements pursuant to the Economic Regulations.

### *Coordination With Other Bureaus*

Participation of the bureau in formation of Board policy calls for close coordination of effort with three other bureaus of the Board: Bureau of Hearing Examiners, Bureau of Law and Bureau of Safety Regulation. This integration of action likewise varies according to the type of matter presented. Thus, some matters are prepared for presentation to the Board by the Bureau of Economic Regulation and are submitted to another bureau for written concurrence prior to transmittal to the Board.

In line with this procedure, memoranda on mail rate problems and drafts of orders to show cause for permanent or temporary rates

are prepared within the bureau in active consultation with the rates staff of the Bureau of Law and then are submitted to the General Counsel or Assistant General Counsel, Finance, for his initialled concurrence before transmittal to the Board.

Many matters are prepared for Board presentation by the bureau but are submitted to the Board jointly with other bureaus. Thus, memorandum reports on interlocking relationships and inter-carrier contract matters are generally presented to the Board in the form of joint reports from the bureau of Economic Regulation and the Bureau of Law. Similarly, reports concerning the issuance of certificates of public convenience and necessity to feeder carriers in accordance with prior decisions of the Board, are drawn as joint reports from the Bureau of Economic Regulation, the General Counsel and the Chief Hearing Examiner.

Another class of presentation involves preparation by the bureau of memoranda which are submitted to the Board through another office of the Board.<sup>6</sup> In other instances, the bureau participates in policy formation by way of concurrence in or comments on matters prepared by another office of the Board and submitted to the bureau for concurrence or comments prior to transmittal to the Board. Thus, memoranda to the Board recommending disposition of exceptions filed by a carrier to a mail rate show cause order are prepared by the Bureau of Law (with the consultation, aid and assistance of the bureau's staff) and then submitted to the Office of the Director, Bureau of Economic Regulation, for formal concurrence or comment before transmittal to the Board.<sup>7</sup>

### 3. BUREAU OF LAW — POLICY FORMATION

The primary function of the Bureau of Law is to furnish legal advice to the Board, its members and staff. To the extent that legal considera-

<sup>6</sup> For example, memoranda recommending changes in, or issuance of new, economic regulations are prepared in the bureau and then submitted to the Bureau of Law, which, in turn, transmits them to the Board with a covering memorandum attaching a draft of the proposed regulatory provisions.

<sup>7</sup> The following recent Board policy determinations by and large were based on recommendations of the Bureau of Economic Regulations and indicate the scope of the bureau's influence on Board policy determinations:

*Approval of Route Transfer.* The Board authorized the sale of a route certificate at the fair market price upon provision that intangible value of a certificate must be excluded from the rate base and be amortized to surplus over a prescribed period of time. *Western-United, Sale of Route 68*, 8 CAB 298 (1947).

*Losses Incurred in Non-scheduled Operations.* For rate purposes the Board decided that non-scheduled operations of certificated air carriers may not be supported by mail pay subsidy. Applied in cases of *Alaska A. L.*, and *Caribbean Atlantic A. L.*, Doc. 2021 and 2210 (1948).

*Definition of Self-Sufficiency.* The Board defined self-sufficiency for mail rate purposes as being a status in which profitable operation can be reasonably obtained under honest, efficient and economical management and not as being a condition determined from the profit and loss statement for any given period reported by the carrier. See, *Big "5" Mail Rates*, Doc. 3309 *et al.* (1948).

*Incentive Mail Rates.* The Board established a sliding scale incentive mail rate which varies inversely to passenger load factor for need carriers. See, *Pioneer A. L., Mail Rates*, Doc. 2002 (1947).

tions may determine whether or not action is to be taken and what form it shall take, this function directly affects policy formation. A secondary function is to provide advice of a more general policy nature as to the reasonableness, expediency or consistency of proposed action. Generally speaking, the Bureau of Law participates at all stages of policy formation.

In formal proceedings, the Bureau of Law participates in a more concrete and direct way by furnishing Public Counsel who is an attorney from the Bureau designated as such to present the government case in formal economic proceedings. He participates in prehearing conferences and in hearings before the Examiner to assist in defining the issues of the case, developing an adequate record through the introduction of evidence and cross-examination of witnesses.

After the close of the hearing Public Counsel may file a brief limited to legal issues and points concerning the admissibility of evidence and the definition of issues in the case. When the Examiner's report is issued he may file exceptions to it and a brief in support of his exception, both being limited to legal points which a reviewing court might take cognizance of on appeal. Furthermore, he may participate in oral argument before the Board but is limited to the legal points mentioned above.

After the case is submitted to the Board for decision, Public Counsel may assist the Chief Examiner's Office in drafting the Board's opinion and he may comment on draft opinions from the point of view of their accuracy in the event of judicial review. In proceedings in which the nature of the applications, the lack of adversary parties, or similar factors justify the action, Public Counsel may, through the General Counsel, be authorized to participate more completely in the proceedings at all stages.<sup>8</sup>

There follows an outline of the CAB responsibilities in which the Bureau of Law participates, together with comment on the nature of its participation in policy formation in connection with these functions.

### *Route Proceedings*

The Bureau of Law performs functions affecting internal policy formation of the Board in all types of matters pertaining to the grant or amendment of operating authority under the economic provisions of the Act. These include the issuance, amendment, or suspension of certificates of public convenience and necessity and foreign air carrier permits, granting of authority to suspend service, and issuance of exemptions from complying with various requirements of the Act.

In these matters the Office of General Counsel participates jointly with the Bureau of Economic Regulation and the Bureau of Hearing

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<sup>8</sup> See Economic Regulation Part 302.2(b) (1); CAB Standard Practice No. 23 and Practice Memorandum 5 with Supplement.

Examiners in formulating policy recommendations. Usually, recommendations are originally prepared in the Bureau of Economic Regulation or by the Trial Examiner and submitted to the General Counsel's Office for review on both legal and policy questions prior to submission to the Board. In some cases, the Bureau of Law submits to the Board a separate concurring or dissenting memorandum setting forth its views.

In route and operational cases, attorneys from the Bureau of Law act as Public Counsel and in this capacity influence the **formulation of** policy. In routine cases of this nature, Public Counsel in brief and argument covers only legal issues and takes no position on economic questions, but even in routine cases, he takes a position on questions regarding what applications should be consolidated into a given proceeding, what issues should be injected or deleted from the proceeding, and what disposition should be made of various motions for further hearing, deferral, severance, expedited action, and like matters, all of which have a considerable bearing upon economic policy. In the more complex proceedings, Public Counsel participates fully, with respect to both legal and economic issues.

### *Rate Proceedings*

In rate cases the Bureau of Law acts not only as a technical consultant but as a planning and policy agent. Public Counsel is not restricted to legal issues. For example, a judgment on the legal adequacy of a Board rate decision must be based on an analysis to determine whether economic data in the record reasonably support the conclusion which the Board makes. This analysis must necessarily involve an appraisal of economic data in the records. In most rate cases, therefore, legal and economic problems are so intertwined that the function of the Bureau cannot be limited to the bare legalities but extends to the realm of economic reasonableness.

Moreover, General Counsel advises the Board on policy matters, testing the consistency of a proposed rate policy or decision with previous policies of the Board as set forth in Board decisions, or with legislative policy embodied in the Act.

In the event a case presents only a legal issue, full responsibility for policy determination is on the Bureau of Law. For example, the Board held that it had no power to fix mail rates retroactively for a period before the date of petition, when a final rate fixed by the Board was in effect.<sup>9</sup> In another case the Bureau of Law advised the Board that it had authority to set minimum air freight rates upon the finding

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<sup>9</sup> The General Counsel's position was upheld by the United States Supreme Court on April 18, 1949 in *CAB v. TWA*, 336 U.S. 601. This question was raised in *Penn-Central Airlines, Mail Rates* Doc. 484 and *TWA, Mail Rates*, Doc. 2849, Orders E-1032 and E-1033, decided Dec. 2, 1947, "Motions to dismiss mail rate petitions insofar as they request the fixing of mail rates to be effective prior to petition filing dates, granted."



that a destructive rate war existed in the air freight industry between certificated carriers and non-certificated all-cargo carriers.<sup>10</sup> In drafting rate case procedures, regulations and orders the Bureau acts primarily as a technical consultant and works in close cooperation with the Bureau of Economic Regulation on all rate case programming.

### *Regulation of Tariffs*

In tariff matters the Bureau of Law performs three major functions which in some degree require participation in policy formation by the Board. The bureau advises the Board with respect to (1) reasonableness of the tariff filed as a matter of law, (2) any element of discrimination, undue preference or undue prejudice in a tariff, and (3) whether the carrier has violated the Act by departing from its published tariff.

This advice may involve mixed questions of law and economic judgment, and the Bureau of Law collaborates with the Bureau of Economic Regulation in the latter aspects. In violation cases the Bureau of Law has responsibility for formulating Board action in enforcement and in the conduct of any legal proceedings which may be necessary.

### *Control of Carrier Relationships*

The Bureau of Law participates in internal policy formation of the Board with respect to this function in two ways. First, with respect to such matters as tariffs, mergers, and consolidations, interlocking relationships, and inter-carrier contracts where the Act does not require formal public hearings, it cooperates with the Economic Bureau in formulating recommendations on policy to the Board. These recommendations are formulated in the first instance by the Carrier Relationships Section of the Bureau of Law and the Operations Division of the Economic Bureau, subject to review by the Director of the Economic Bureau and Assistant General Counsel, Finance, before submission to the Board.

Second, in the above matters which require public hearing, attorneys from the Bureau of Law participate in formulation of policy through their role as Public Counsel. This role involves formulation of issues for a prehearing conference, participation in the development of a record covering all issues, submission of briefs to the examiner covering all legal and public interest issues in the proceeding, submission of briefs to the Board and oral arguments thereon covering such issues.<sup>11</sup>

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<sup>10</sup> *Air Freight Rate Case* (Order E-1415, April 21, 1948).

<sup>11</sup> In the proposed sale of routes by Northeast to Wiggins Airline (Doc. No. 3337) Public Counsel, by motion, recommended that the Board entertain proposals from outsiders to purchase the routes offered for sale. This raised the important policy question as to whether route sale proceedings should be confined only to the parties filing the agreement of sale.

*Promulgation of Economic and Safety Regulations*

The Bureau of Law has the same responsibilities with respect to economic and safety regulations. Responsibility for initiating Board action on proposed regulations lies with the Bureau of Safety Regulation and the Bureau of Economic Regulation. Proposed regulations are nevertheless subject to approval by the General Counsel prior to the request for Board action.<sup>12</sup> The bureau is also required to render interpretations of both economic and safety regulations for the Board and the Board's staff.

*International Matters*

The Bureau of Law advises the Board on all aspects of its activities involving problems of international air law, and represents the Board on various committees dealing with international matters. A wide field of international conventions relating primarily to private international law exists in which the General Counsel has primary interest (*e.g.*, conventions relating to liability of the carriers for damage to passengers, cargo, and third parties). The Bureau of Law provides representation for the Board to all international conferences on legal matters.

An area of mutual interest in the international field for the Bureau of Law and the Bureau of Economic Regulation is the consideration of airline agreements filed with the Board, of which the most important are agreements filed by United States carriers who are members of the International Air Transport Association (IATA). In considering whether to approve or disapprove these agreements, problems of law and problems of economic policy are inextricably intertwined.

#### 4. BUREAU OF HEARING EXAMINERS — POLICY FORMATION

*Economic Regulation Cases*

The Bureau of Hearing Examiners conducts all formal proceedings arising under the economic and safety enforcement provisions of the Act. The Examiners hear the evidence, study the record and briefs submitted, and prepare their recommendations to the Board in the form of an Examiner's report. Necessarily, their recommendations cover not only factual material but also problems dealing with the Board's general policy.

In new route cases, the Examiner is probably the most influential staff member in that he is given complete freedom to recommend in his Examiner's report the decision he believes the Board should reach. He is not required or expected to correlate his recommendation with

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<sup>12</sup> The bureau recently recommended the adoption of a proposed revision of Section 292.1(d)(2) of the Economic Regulations which would provide that no Letter of Registration should be issued to an applicant who had been an owner or officer of an Irregular Air Carrier whose letter had been revoked and not reinstated unless the Board found that the public interest would not be adversely affected. This proposal became moot when the Board suspended further issuance of such Letters on Aug. 6, 1948.

other bureaus. Although all Examiners are lawyers, they occasionally seek legal assistance from the Bureau of Law. If he finds it expedient he may request financial and traffic data from the Bureau of Economic Regulation.

Following the filing of briefs to the Board and oral argument the Examiner is usually present at Board discussions, is called upon to provide information based upon the record, and frequently to offer advice on matters of policy dealing with the Board's decision. This procedure is followed because the Examiner is the only member of the staff with close contact with the facts, the record, and the argument.

The issues confronting the Examiners in preparing his report in new route cases are frequently of a broad policy nature. For example, in each new route case he is usually confronted with the problem of whether competitive service should be established. In the so-called *Seaboard Case* the issue of competitive service was raised and argued at considerable length by all parties to the proceeding. The Examiner came to the conclusion that there was justification for a competitive route from New York to Florida via a divergent route, such as that proposed by National, rather than a directly competitive route touching all intermediate points served by Eastern as proposed by Seaboard Airlines. This decision was followed by the Board in its final opinion.

In cases of mergers, purchases, etc., it is necessary for the Examiners to deal with policy considerations. Thus, in the case in which American sought to acquire Mid-Continent, the Examiner came to the conclusion for policy reasons that the proposed acquisition was adverse to the public interest.<sup>13</sup> This recommendation was followed by the Board in its final decision. Likewise, the Board followed its Examiners in initiating a program of three-year experimental feederline service following an investigation and report in the *Local Feeder Pickup Service Investigation* case.<sup>14</sup>

Other illustrations of instances in which the Examiners have made important recommendations covering general issues of policy are found in three recent cases: In the *Air Freight Case* the Examiner recommended the award of certificates of public convenience and necessity to a number of all cargo carriers, and in general the Board by a 3 to 2 decision followed the Examiner in the decision it issued April 25, 1949.<sup>15</sup> In the *Freight Forwarder Case* the Examiner recommended that exemption authority be granted to air freight forwarders to permit their engaging in indirect air transportation. The Board's decision followed in general the recommendation of the Examiner.<sup>16</sup> In the *Pan American Domestic Route Case* Pan American Airways is seeking to engage in domestic air transportation for the first time. The Exam-

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<sup>13</sup> *American Air., Control of Mid-Continent Air*, 7 CAB 365 (1946).

<sup>14</sup> 6 CAB 1 (1944).

<sup>15</sup> Order Serial E-2759.

<sup>16</sup> *Air Freight Forwarder case*, 9 CAB .... (Serial E-1968, Sept. 8, 1948).

iner recommended denial of all of Pan American's proposals with the exception of that involving operations between New York and Miami. This case has been argued before the Board and is pending the Board's decision.

#### SAFETY REGULATION CASES

This Bureau of Hearing Examiners through its safety enforcement examiners, also plays an important part in the determination of policies relating to the Board's safety enforcement work.<sup>17</sup> The Safety Enforcement Proceedings Division handles all suspension and revocation enforcement proceedings. The Examiners which comprise this division are called upon to interpret safety rules and regulations in specific cases, and as their decisions in these cases are issued as initial final decisions only those to which exceptions are taken are reviewed by the Board. In the fiscal year 1948 exceptions were taken in 67 out of 776 proceedings. The interpretation placed upon regulations by the Examiners over a period of time exerts a substantial influence upon the meaning of the regulations.

The decisions of these Examiners likewise play a very influential part in fixing the pattern of discipline followed in the safety enforcement proceedings. The important part played by the Examiners does not stem from their power or duties alone, but comes from exercising them in conjunction and in cooperation with those of the Safety Enforcement Staff of the Administrator. The Board functions as an appellate tribunal and in practice seldom reverses or modifies policy decisions of the Safety Examiners.<sup>18</sup>

#### 5. BUREAU OF SAFETY REGULATION — POLICY FORMATION

The Bureau of Safety Regulation participates in the making of Board policy decisions in the preparation and development of technical and general amendments and additions to Civil Air Regulations. The need for changes in the CAR's usually come from technical developments and advancement in aeronautics which renders current practice untenable or which creates new areas of regulatory need. Here the Board necessarily relies upon the aeronautical engineers on the staff of this bureau. In these cases delineation of a general policy is necessary in order to insure an orderly development of the more technical aspects of Civil Air Regulations.

As the study and preparation of a proposed regulation progresses and it appears that an important policy with respect to such regulation should be established, the Bureau of Safety Regulation assembles all

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<sup>17</sup> See Armour and Moorhead, *Procedure in Safety Enforcement Proceedings with Respect to Airman Certificates—The Evolution of an Administrative Procedure*, 16 J. Air L. & C. 40 (1949).

<sup>18</sup> *Rentzel, Adm. v. Sisto, Airman Certificate Enforcement* case, Docket SR-1989, Order S-182 of October 26, 1948, discussed in Appendix III to the Staff Report, is an illustration of the type of policy decision that the Safety Examiners are called upon to make.

pertinent facts and presents the issue to the Board by memorandum with appropriate recommendations. The bureau participates in discussion before the Board. At times the delineation of policy respecting safety regulations originates with the Board itself and the bureau assists in the Board's deliberation by furnishing and interpreting such technical data as may be required.

The following basic policy determinations which have been made by the Board recently on the recommendation of the Bureau of Safety Regulation, serve as a general guide to that bureau in the formation of amendments and additions to the Civil Air Regulations.

*Safety Standards for Passenger Carrying Aircraft.* The policy that all operations in which passengers are carried for hire in large transport type aircraft, whether in scheduled, irregular, or contract and charter service, shall meet the same level of safety standards in so far as it is technically practicable.

*Industry Participation in Improved Operational Procedures.* The policy that regulations shall be prepared in a text sufficiently objective and flexible as to enable the aviation industry to participate to a major extent in the formulation of improved operational practices and procedures and in the preparation and application of airworthiness certification data. (The industry and the Administration do not feel the Board has yet applied the policy extensively.)

*Use of Nontransport Category Aircraft.* The policy that aircraft not certificated in the transport category may be used in scheduled air carrier operation by meeting the performance requirements of such category.

*Staff Interpretations of C.A.R.'s for Administrator.* The policy that the Board would furnish the major interpretations found necessary by the Administrator in implementing the Civil Air Regulations through staff coordination and not by supplemental rules.

*Amendments to CAR's.* Following the above general policies many substantial changes and additions to the CAR's have been made or are in the process of being made.<sup>19</sup> Much remains to be completed.

## 6. BUREAU OF SAFETY INVESTIGATION — POLICY FORMATION

The Director of the Bureau of Safety Investigation is directly responsible for the formulation of policies and procedures applicable to the investigation and analysis of aircraft accidents. Although the Board approves all policies affecting the bureau's responsibility in this field, considerable latitude and independence of action is delegated to the Bureau of Safety Investigation because of the highly technical nature of the causes of many aircraft accidents.

The Bureau of Safety Investigation is organized with a field organization which maintains close coordination with the bureau headquar-

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<sup>19</sup> For example: Proposed new Part 45 to the Civil Air Regulations, providing for commercial operating certificates to persons carrying passengers for hire under contract and charter basis. Proposed new Part 46 providing operating rules for helicopters used in scheduled or irregular air carrier service. A general revision of Parts 40, 41, and 61 providing of air carriers operating certificates and prescribing the operating rules for scheduled air carriers.

ters with respect to policy considerations which may arise in the course of accident investigations or hearings.

## BASIC APPROACH TOWARD POLICY FORMATION

### I. METHODS USED FOR FORMULATING POLICIES

#### *Reliance on Case-by-case Approach*

The Board has in general conceived that the Act required it to develop its basic policy determinations of routes, rates, and carrier relations, within the framework of quasi-judicial proceedings. Since its decisions in such cases must be predicated upon the evidence and record made in the proceeding, and the contentions advanced by the parties, the Board has felt that any general route plan would have little use or value. The Board members have stated that the present procedure is wise and necessary in order to protect the Board from political and other pressures.

With each final decision not of routine nature, the Board has handed down an opinion setting forth the principles upon which that decision was based. An examination of Board opinions in the new route decisions shows an amazing degree of vacillation and inconsistency.<sup>20</sup> At no time has the Board attempted to correlate and reconcile all of the principles enunciated in its separate opinions. The consequences of this are discussed more fully in the next section. While practitioners before the Board generally do not feel that the Board could enunciate general rules or standards which would define public convenience and necessity in a manner applicable to all new route cases, they are not happy with the confusing state of the precedents.

#### *Absence of Over-all Planning*

As a consequence of its basic approach, the Board has seldom undertaken long-term planning programs concerning matters that would ultimately come before it in quasi-judicial proceedings. An outstanding exception is found in the postwar international air route pattern. During the war the Board made this relatively easy study in an informal manner after extensive coordination with other interested departments<sup>21</sup>

Some of the more general formal investigations undertaken by the Board have in a sense formulated long-term programs which the Board has subsequently followed. An example of this was the investigation of the need for "Local or Feederline and Pickup Air Services" made by the Board in 1943 in which it approved a program of initiating three-year experimental feeder services.

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<sup>20</sup> This is fully developed in an extended article by Westwood, *Choice of the Air Carrier for New Air Transport Routes*, 16 Geo. Wash. L. Rev. 1 and 159 (1947-8).

<sup>21</sup> The "CAB Postwar International Route Planning" is discussed at length in Appendix III to the Staff Report.

But the Board has seldom anticipated its problems or planned ahead to meet them. Generally, it has lagged behind the industry in recognizing emerging problems and has started to take effective action only when they could no longer be ignored. Thus the feederline investigation was spurred on by a clamor from many small communities for air service. The general acceptance of aviation during the war and the advantages of commencing air service promptly at the end of hostilities made the need for a study of the international route pattern clear.

The investigation of the dependence of carriers on air mail was instituted at a time when the entire air transport industry was in a financial crisis. Again the Board started a general investigation in August, 1948, into the activities and practices of large irregular air carriers only after widespread industry publicity of alleged abuses of these carriers' limited operating authorizations.

Only after continued heavy operating losses of the carriers and rising costs had become critical and some carriers had applied for increased rates, did the Board confer informally with the industry on action to increase non-mail revenue to meet higher operating costs. But the situation was then so serious that the President directed the Reconstruction Finance Corporation to make a study of airline finances with particular reference to methods of meeting airline capital requirements by equity financing and government loans.

The Board has at times urged Congress to consider new legislation. In its annual report to Congress in 1942, a comprehensive summary of the amendments to the Civil Aeronautics Act then considered desirable was presented. On several occasions the Board has urged Congress to give it authority to regulate the fares of United States carriers engaged in foreign air transportation and to control the issue of airline securities.

### *Use of Regulations*

The Board has, of course, used regulations as a method of policy determination as well as case-by-case adjudication.

*Safety Regulations.* They have been used primarily in the safety field where the regulations can hardly be held out as models. In theory the Civil Air Regulations should consist of general standards, specifications and operating rules. In practice they have been loaded with many extremely detailed and minor provisions. An example is the provision that when the carrier permits smoking in the cockpit, ash receptacles shall be provided for each pilot.

The fact that the regulations have grown to more than 240,000 words (estimated by CAB staff) suggests their conglomerate and detailed nature. The Board has indicated that it intends to make exten-

sive revisions of the regulations and to restrict them to general statements of principles and standards.

*Economic Regulation.* In the economic field the Board has supplemented its case-by-case decisions by Economic Regulations. In addition to routine regulations requiring the filing of data and prescribing procedures, the regulations have been used to classify carriers and to exempt certain classes from various provisions of the Act. In specifying the conditions under which such carriers may operate, the Board has not always acted realistically or with an understanding of the problem of enforcement. For example, large irregular carriers were authorized to operate without certificates of convenience and necessity under conditions which would not ordinarily allow them to operate profitably so that they were constantly tempted to circumvent the restrictions, and which made surveillance and enforcement almost impossible.<sup>22</sup> The Board has recently recognized this problem and has revised its regulation.

*Areas of Neglect.*

The Act directs the Board to foster and promote all classes of civil aviation including personal flying, private carriers and nonscheduled common carriers as well as scheduled air carriers. Before the Reorganization Plans in 1940 the Board (Authority), as well as the Administrator, was clearly charged with the welfare and development of all civil aviation. Since 1940 the Board has given primary emphasis to the development and welfare of the certificated air carriers. As it was charged with determining operating subsidies for the certificated carriers, the Board's preoccupation with their problems is understandable.

In its solicitude for the certificated carriers, the Board has emphasized its promotional responsibility to them and neglected its regulatory and enforcement responsibility to other classes of aircraft operations. Since the end of the war, with the great influx of non-certificated operations with war surplus transports on a contract or nonscheduled basis, and the emergence of air freight forwarders, the Board's policies have become more and more confused as to the relative importance and emphasis to be given to the various classes of commercial operators.

## 2. DEVELOPMENT OF DOMESTIC AIR ROUTE PATTERN

Paradoxically, although the Board has emphasized its promotional responsibility for the welfare of its certificated air carriers, it has continued to handle its domestic route policy determinations, including the measure of competition, wholly within the framework of quasi-judicial new route proceedings and not as a promotional planning agency might be expected to do.

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<sup>22</sup> Economic Regulation 292.1.



The domestic route mileage has been tripled since the Board inherited the basic "grandfather" route pattern from the Post Office Department in 1938. This entire expansion has been made within the framework of individual proceedings some of which, however, have considered numerous applications for service within a large area of the country. The so-called area cases show to some extent the Board's awareness of the need to compare the various proposals and relative ability of applicants to better integrate the air transport systems into a coordinated whole.

The review of the Board's opinions granting additional service in new route and amendment cases illustrates its failure to develop and consistently apply adequate standards and its tendency to befog the economic policies. With the broad standards of Section 2 as a yardstick, the Board in a number of its early new route opinions<sup>23</sup> outlined the considerations which would govern its determination of public convenience and necessity in specific instance. These included:

- (1) whether the proposed service will serve a useful public purpose, responsive to a public need;
- (2) whether this purpose can and will be served as well by existing carriers;
- (3) whether it can be served by the applicant without impairing the operations of existing carriers in a manner contrary to the public interest; and
- (4) whether the cost to the government of the proposed service in the form of mail pay or in the cost of required navigation facilities, will outweigh the benefit which would accrue to the public from the new service.

Accordingly, when inquiring into a new route proposal, the Board seeks to ascertain the traffic potential, probable cost of the service, adequacy of existing services, possible diversion from other carriers, amount of new one-carrier and one-plane service that would be provided, effect of the proposed route upon the scheduling and operating problems of the carriers, also the need, if any, for competition in the area in question, needs of the postal service and national defense, and the fitness and experience of the applicants.

As the number of cases in which additional service was requested increased on the Board's docket, the Board continued to weigh the individual factors but either made no mention of the general standards for public convenience and necessity, or merely stated that they had been previously set forth and cited cases in which they had been listed. This *ad hoc* method has led to the Board's determining public convenience and necessity without identifying its controlling standards or indicating any over-all policy objectives. New services and new routes have been authorized without anyone being able to tell from

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<sup>23</sup> See, for example, *United A. L., Red Bluff Op.*, 1 CAA 778 (1940) and *Eastern A. L., St. Louis-Nashville-Muscle Shoals Op.*, 1 CAA 792 (1940).

the Board's opinion what the elements were which the Board considered in its decision.

### *Criticism of Performance of Board*

During the past year the Board has been severely criticized by many authorities both in the aviation industry and outside of it for its failure to develop an over-all domestic air transport pattern. Implicit in the criticism of the Board's lack of over-all planning of route development is the criticism of the amount of competition, or lack thereof, over various domestic routes and route segments.

The President's Air Policy Commission found there was "widespread confusion as to the principles which guide the CAB in its route determinations" and that there was need for a "comprehensive survey of the present situation and the development of a more cohesive philosophy" for the development of a national route pattern.<sup>24</sup> The Congressional Aviation Policy Board similarly criticized the Board and recommended that a "disinterested non-governmental agency" assist the Board in making a study of the foreign and domestic air transport systems in order to present a basic route plan which may be used as a guide for future revisions or extensions to the present route pattern.<sup>25</sup>

The Board has attempted to justify the present route pattern on the ground that it has been largely influenced by the corporate route pattern established by the "grandfather" routes. While the Board admits that major route additions and consolidations have altered somewhat the 1938 pattern "many of the most difficult problems to be met in the future development of domestic air transportation are attributable to conflict between the original route pattern and technological aviation progress."<sup>26</sup>

The Board showed little real enthusiasm for, or fundamental appreciation of, the need for making the studies recommended. It has stressed the difficulty in separating over-all planning of route development from its other functions. And of course the route pattern for the domestic air-transport system involves not only the entry of new carriers into the field and competitive extensions of the routes of existing companies, but also whether the Board should encourage or prevent combination of existing companies.

In any case, the Board insisted that if such a study were to be made it should be made by the Board's own staff because of the expertise of the staff, availability of data, and advisability of continuing the study as a permanent project. As a result of this criticism the Board directed

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<sup>24</sup> Report of the President's Air Policy Commission, *SURVIVAL IN THE AIR AGE*, 110 (Jan. 1, 1948). See, 15 J. Air L. & C. 85 (1948).

<sup>25</sup> Report of the Congressional Aviation Policy Board, *NATIONAL AVIATION POLICY*, Recommendation 33 (Mar. 1, 1948). See, 15 J. Air L. & C. 208, 213, (1948).

<sup>26</sup> Statement of CAB before the President's Air Policy Commission, Oct. 27, 1947.

its Analyses Division to make a comprehensive study of the domestic route pattern. This project has been set up with 14 trained analysts and is estimated to require nine months. The report was originally promised in February 1949, and is now expected to be complete in July 1949.

The study will include a carrier-by-carrier analysis, supported by tabular and graphic exhibits of the development of the corporate route pattern begun with the "grandfather" system. It will make an analytical presentation of the operating and financial characteristics of each corporate route structure appraising inherent and developmental deficiencies and exploring possible remedies.

It is reported that substantial progress has been made in developing comparative standards for measuring the relative financial advantages and disadvantages of route service and traffic characteristics. Using these standards or formulae, the study will attempt to estimate the effect of traffic upon the finances of the operators and the movement of possible route revisions by segments and systems.

### 3. MAIL RATE DETERMINATIONS AND STANDARDS OF MANAGEMENT EFFICIENCY

One of the major functions of the Board is determining air mail rates to be paid to carriers. In doing so, the Board is required, under the Act, to determine the need of the carrier for revenue if managed with honesty, economy and efficiency, and to exclude from consideration any losses or expenses resulting from inefficient or improper management. This involves governmental appraisal of the business judgment of private enterprise.

The development of standards and methods for evaluating management has therefore been an important duty of the Board and one of its most difficult. The Board has approached this task with considerable deference. In the early stages of regulation, when the industry was so new, the Board necessarily had to consider each carrier more or less separately.

But effective evaluation of efficiency of carrier management, by its very nature, depends upon comparison of similar operations under similar traffic and route conditions. The Board, therefore, some time ago, began cautiously to develop comparative standards which should become increasingly reliable as the industry progresses toward self-sufficiency.

On the basis of the Board's air mail rate decisions, it is difficult to estimate the effectiveness of the Board's judgment of economy and efficiency of airline management. It is commonly asserted that the airlines still indulge in extravagant practices notwithstanding the drastic retrenchments made during the past two years of financial reverses.

Regardless of the correctness of this assertion, the Board's techniques for judging management appear to be still in a relatively preliminary stage.

But the Board has made considerable advances in developing its techniques by successive steps.

(1) *Reports.* The carriers are required to file adequate comparative traffic, financial and operating data, by means of the Uniform Accounting System and report forms. The accounting and reporting practices are verified through periodic field audits of carriers' books of accounts.

(2) *Disallowances.* Substantial amounts of unreasonable and unnecessary costs are disallowed in mail rate cases on the basis of detailed analyses of carrier operations and comparisons of its operating results with those of other carriers. Such disallowances are based upon evidence sufficient to establish that the costs were extravagant, unnecessary, or inapplicable to the particular operations for which a rate is being established.

(3) *Comparative Cost Standards.* The Board has been developing cost analysis procedures for establishing comparative cost standards. After allowing for cost factors not controllable by management, an effort is now made to measure the cost variances in carrier route systems due to the number of schedules operated, the average length of flight, the number of route miles per station, the average length of passenger trip, the density of traffic, the performance factor, the total volume of operations, the attainable load factor, and discrepancies inherent in the carrier's route system.

(4) *Restriction of Volume of Subsidized Services.* In order to limit mail compensation to service required by the public interest, detailed studies are made of the traffic volume in relation to the schedules operated over major route segments. Except for minimum service requirements, schedules are examined with a view of determining the highest reasonable load factors consistent with adequate service to the public as a test of the volume of services which should be supported by mail pay.

(5) *Incentives for Efficiency.* The Board has been trying to develop incentives for economical and efficient management through types of mail rates established. Recently the Board has formulated a sliding scale mail rate which varies inversely to the passenger load factor. This recognizes managerial efficiency and permits benefits therefrom to redound to the carrier.

(6) *Special Investigations.* Special investigations are made to determine the causes of aggravated cases of deteriorated earnings with resulting increased financial dependence upon the government. Survey teams from the staff have made on-the-spot informal investigations of five carriers showing sharply deteriorated earning positions. The surveys were made with a view to ascertaining whether the adverse earning positions are related to conditions controllable by management or inherent in the carrier's route system. This information was made available to staff processing the mail rate cases.

In 1946, the Board was confronted with an avalanche of petitions for emergency increases in air mail rates due to rapidly deteriorating financial conditions. This forced the Bureau of Economic Regulation to review the procedure then being followed of slowly processing per-

manent mail rates. As a consequence, an emergency mail rate program was devised by the Rates and Accounts Division of the Bureau and approved by the Board. While this was not published as a program by the Board, it nevertheless constituted a very real one which has been followed in handling air mail rate proceedings during the past two years.<sup>27</sup>

This study also shows the problems confronting the Board in passing in retrospect upon decisions of air carrier management. The conditions confronting the industry have changed so rapidly during the last few years that equipment programs and operating plans which appeared reasonable in 1945 now appear to be wholly unjustified. The Board has shown caution in censuring these decisions of management. It has had to weigh the expense to the government of overlooking possible errors of management against the possible effect substantial disallowances might have on the future of the transportation system made up of carriers already in financial straits.

#### 4. DATA FOR POLICY DETERMINATION

##### *Data Required to be Filed by Carriers*

Section 407 of the Act empowers the Board to require air carriers to file with the Board reports and accounts of all kinds and to keep their accounts as prescribed. Thus, the Board requires carriers to keep their accounts, records and memoranda in accordance with the "Uniform System of Accounts for Air Carriers" with such waivers and modifications as the Director of the Bureau of Economic Regulation may establish.<sup>28</sup> The regulations also provide the length of time each record shall be preserved.

The principal periodic, financial and statistical report required to be filed by scheduled air carriers is CAB Form 41, "*Report of Financial and Operating Statistics for Air Carriers*." This is a very comprehensive report including numerous schedules which must be filed monthly, quarterly or annually. These include balance sheets, profit and loss statements, statements of property and equipment, special detailed operating and expense item flight and traffic statistics and corporate data including dividends paid and lists of general officers, directors and stockholders.

This report with its various schedules constitutes the basic traffic, financial and operating information employed by the Board in the formulation of many of its policy decisions. In addition, the Board may audit the carriers' accounts, inspect property and request special reports and specific information. For its semi-annual traffic survey the Board requires "origin — destination" and "station-to-station" data for revenue passengers (CAB Forms 2787, 2788). Similar, but less

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<sup>27</sup> This is set forth in greater detail in the study of "*Postwar Air Mail Rate Program*" Appendix III to the Staff Report.

<sup>28</sup> Economic Regulation, Part 202, issued Jan. 1, 1947.

extensive, reports and records are required of non-certificated irregular air carriers and indirect cargo carriers.<sup>29</sup>

Reports of accidents are required involving both air carrier and all non-air carrier aircraft for the purpose of compiling accident statistics and to develop information relating to the prevention of accidents.<sup>30</sup>

In addition to the foregoing reports, records and accounts, air carriers are required to file their tariffs, operating schedules, interlocking relationships and contracts with other air and surface carriers, and agreements relating to consolidations, mergers and acquisitions of control. These are all subject to approval by the Board under various sections of the Act.

#### *Staff Research and Analysis*

The material required to be filed by the carriers provides the Board staff with extensive material for research and analysis. The operating and financial material is digested and processed by various divisions of the Bureau of Economic Regulation. Accident reports are processed by the Bureau of Accident Investigation.

The Analyses Division of the Bureau of Economic Regulation is devoted exclusively to research and preparation of periodic surveys and special long-range studies as specifically directed by the Board. The Foreign Air Transport Division prepares appropriate reports relating to foreign air transportation based upon material provided by the carriers and submitted through the Department of State relating to operations of foreign air carriers. The Accounting and Rates Division and the Tariff and Service Division process material coming within their responsibilities.

A substantial portion of the activity of the entire Bureau of Economic Regulation is devoted to research and analysis of material submitted by the carriers and required by the Board in the processing of mail rate, tariff, carrier relation and to a lesser extent new route proceedings.

#### *Formal Investigations*

While the Board usually waits for applicants to initiate most types of proceedings, the Board has taken the initiative in instituting a number of investigations. Under the Chairmanship of Mr. Pogue, a number of important investigations were conducted by public hearing.<sup>31</sup>

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<sup>29</sup> This information is required of such carriers by certain subsections of Section 292 of the Economic Regulations and by CAB Forms 2785 and 2789.

<sup>30</sup> CAR Part 01.30 and CAB Form Nos. 453, 454, 454a, 457, 458, 1034, 1034a and b.

<sup>31</sup> See also *Alaska Air Transportation Investigation*, 3 CAB 804 (Oct. 22, 1942); *Universal Air, Investigation of Forwarding Activities*, 3 CAB 698 (Sept. 15, 1942); *Caribbean Investigation*, 4 CAB 199 (Apr. 7, 1944); *Terminal Investigation, Panagra*, 4 CAB 670 (May 24, 1944); *Local Feeder and Pickup Service*, 6 CAB 1 (July 1, 1944); *Government Travel Discount Tariff*, 6 CAB 825 (Apr. 18, 1946); *Nonscheduled Air Services*, 6 CAB 1049 (May 16, 1946).

The international air route study made during the war is one example (Appendix III, Study A), and a similar domestic route study would have been undertaken at that time if the other members had concurred. Chairman Landis was active in initiating investigations to determine minimum air cargo rates,<sup>32</sup> and to ascertain to what extent the increased dependence of five carriers on air mail compensation was due to either inefficient management or uneconomic route pattern or both.<sup>33</sup>

In the latter instance field survey teams examined company files and interviewed company personnel informally at the carriers' offices. Since information thus obtained was not derived in public hearing, the present Board appears confused as to what to do about the situation uncovered. It is understood that the investigations will be dismissed unreported.<sup>34</sup>

During ten years of its existence the Board has instituted many general investigations which have ranged from such comprehensive investigations as that of freight forwarders to innumerable relatively trivial matters, such as service to Pecos, Texas. The latter type have undoubtedly delayed the more important investigations. Twenty-five investigations were pending August 26, 1948, indicating the varied character of investigations instituted by the Board.

#### *Publication of Data*

The Board makes available to interested parties a wide variety of material concerning the finances, traffic and operations of the certificated carriers. Without attempting a complete list, these include maps, mileage books, monthly summaries of traffic and operating data for individual carriers and groups of carriers and quarterly summaries of financial data. A semi-annual traffic survey covering point-to-point traffic, origination and destination of traffic flow is also published. A foreign Airline Manual, giving information on the routes, operations and finances of foreign air carriers is also maintained.

The Board also issues various special studies dealing with the economic aspects of air transportation. A recent study, for example, contains a six months' analysis of passenger traffic across the North Atlantic showing the proportion carried by United States and foreign carriers, the proportion of United States citizens and foreign nationals carried, etc. Other recent studies have included a two-year forecast of air traffic and a study of the cost of capital to the airlines. The Board is presently conducting a survey of the air cargo traffic potential, although impeded by lack of funds and personnel.

All Board orders, opinions, rules and regulations are made public in compliance with statutory requirements. The official published

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<sup>32</sup> *Investigation of Air Freight Tariffs*, Oct. 24, 1947.

<sup>33</sup> *Chicago and Southern Airlines*, Mar. 8, 1947; *Colonial Airlines*, Mar. 18, 1947; *Northeast Airlines*, Mar. 19, 1947; *Western Airlines* Apr. 29, 1947; and *All American Aviation*, May 2, 1947.

<sup>34</sup> *Investigation of Chicago and Southern*, dismissed July 12, 1948.

reports of the Board, however, contain only those opinions issued in conjunction with final Board orders. As a result, important Board opinions indicating the attitude of the respective Board members regarding important policy matters but issued with procedural or preliminary orders, are omitted from the permanent volume of official CAB reports.<sup>35</sup>

#### 5. RECONSIDERATION OF POLICIES BY THE BOARD

The Act makes no provision for reconsideration, but the Board has not hesitated to reconsider individual decisions at the timely request of the parties. In a recent proceeding the Board temporarily stayed the effectiveness of a certificate it had issued pending final decision upon reconsideration.<sup>36</sup> In fact, it has been said that the threat of taking an appeal to the court is sufficient cause for the Board to grant reconsideration of an order. The Board has reversed its decisions in a number of instances.

In the broader fields of policies, the Board has also not hesitated to reconsider and review its programs. In the feeder airline experiment the Board has issued an opinion in connection with an application of Florida Airways, Inc. for additional service to the effect that experience to date with that carrier shows that the cost to the Government in the form of mail pay had been exorbitant for the public benefits received — air mail equivalent to \$58.81 per passenger as compared with a cost to passengers of \$7.10 for an average trip of 133 miles.<sup>37</sup>

The Board stated that it intended not to renew the carrier's temporary certificate when it expired in March, 1949. The Board concluded "the dictates of a sound development of air transportation militate against continued experimentation with public funds in this area without more positive assurance that the proposed service would be responsive to a vigorous public need and that it could eventually be operated at a reasonable cost to the Government commensurate with the service used."

#### *Industry Pressures Against Change*

The certificated air carriers naturally resist any reconsideration of the policies of the Board that might impair their favorable subsidized position. These carriers have also resisted the entry of new cargo and passenger services into air transportation. They oppose any attempt to separate air mail subsidy from a service mail rate on the ground that it would be useless and make them more vulnerable to criticism.

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<sup>35</sup> For example, "Order, with Opinion, Instituting Investigation of Chicago and Southern Airlines route south of New Orleans," Doc. 2834, Mar. 3, 1948.

<sup>36</sup> *Kansas City-Memphis-Florida Case*, Doc. 1051, *et al.*, decided Sept. 20, 1947, 7 CAB 554; Supplemental opinion on Reconsideration, decided July 23, 1948, 9 CAB .... (Order No. E-1813). See discussion in Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & C. 377 (1948).

<sup>37</sup> *Additional Service to Florida Case*, Doc. 1668, *et al.*, Sept. 1, 1948, Order No. E-1902.



The Board recognizes this resistance and has by no means slavishly bowed to it. During the past two years the Board has issued several important exemption orders over the protests of established carriers, such as an order allowing irregular air carriers to operate without certificates and an order allowing air cargo operators to operate as common carriers pending determination of their applications for certificates. On the other hand, it is noteworthy that the Board has a keen sense of responsibility for the financial welfare of the certificated carriers and this has tended to retard changes in policies which might appear to be contrary to the essential interests of these carriers.

### *Influence of Judicial Decisions*

Only a few of the Board's final orders have been appealed to the Federal Courts. As of October 1, 1948, there had been 22 appeals involving economic matters and 5 appeals involving safety. Of these ten were from CAB orders granting or denying certificates of public convenience and necessity and five were taken from orders involving rates for the transportation of mail. The *Latin American Air Service Case*, was the only case involving the CAB to be passed by the United States Supreme Court during the first 10 years of the Board's life.<sup>88</sup>

The relatively small number of appeals from Board orders can be explained in several ways. It may show that the Board has largely regulated air transportation to the general satisfaction of the industry and has not used its powers in an arbitrary manner. Another factor may be a reluctance of the established air carriers, in particular, to appeal Board orders on the theory, apparently, that such action might prejudice their position before the Board in future proceedings. In addition, Board members have shown uneasiness to any threat of an appeal to the courts, and this apprehension is reported to have colored some decisions. Recently non-certificated carriers have taken the Board into court with increasing frequency.

Even where appeals have been taken, the percentage of affirmances has run very high. The Act provides that findings of fact by the Board shall be conclusive when supported by substantial evidence and that the courts shall not consider objections to Board orders unless urged before the Board or unless there was reasonable ground for the failure to do so (Section 1106(e)). Due to these provisions of the Act and to the recognition by the courts that the Board was set up by Congress as the special agency to administer the Act and carry out its objectives, the courts have shown reluctance to review more than "procedural due process" questions except in clear cases of insufficient findings.

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<sup>88</sup> *Waterman Steamship Co. v. CAB*, 333 U.S. 103 (1948). On April 18, 1949 the U. S. Supreme Court passed on TWA's petition for "retroactive" air mail compensation for period prior to the date of its petition, *TWA v. CAB*, 336 U.S. 601.

## CONCLUSIONS ON APPROACH TO REGULATORY TASK

### IN GENERAL

Stepping in as a regulatory and promotional agency when air transportation was actively expanding with little Statutory guidance, the CAB has been confronted with major policy issues not faced at all or in the same degree by the ICC. How much new competition should be authorized? What should be the role of contract air carriers? Should special cargo carriers be authorized? Should freight forwarders be recognized? How can economy and efficiency of carrier operation be policed so as to keep unjustified expenses from entering air mail subsidy and at the same time not unduly interfere with private management?

The expanding and rapidly changing character of air transportation has resulted in the presentation of one or more new and important policy determinations in most individual proceedings. The Board, on the other hand, has not been burdened with a great number of routine cases such as has encumbered other agencies.

The adherence of the Board to the case-by-case method of policy determination to the exclusion of the establishment of general standards and programs is perhaps the most fundamental characteristic of the Board's approach to its regulatory task. It has done little to anticipate its problems or to prepare for them in advance. Occasionally, the Board has initiated investigations of fairly broad scope in dealing with economic policies, but by and large these have not appeared to influence or mold its subsequent individual case decisions.

It appears that the Board could have done better in adopting general standards to guide it in handling the many important and novel policy decisions that have come before it. It has been pointed out that its decisions in individual cases have developed little precedent that either the Board or industry considers binding. This has made the Board's problem of rendering fair and consistent decisions particularly difficult.

It must be recognized that the making of policy decisions within the framework of judicial procedure is a complex and time-consuming process. Too great a speed-up in handling would surely lead to inadequate opportunity for all parties to present their contentions or to rendering of snap judgments by Board members without adequate understanding of fundamental problems involved.

### APPROACH TO MAJOR TASKS

#### *Routes*

The development of an integrated domestic route pattern with competition sufficient to achieve the objectives of the Act is the responsibility of greatest national importance vested in the Board. The

rapid expansion and changing techniques of air transportation emphasize the need for such planning.

Certainly the Board has given undivided attention to new route cases but the criticism by industry of the present route pattern and of the amount of competition, reaffirmed in the reports of the President's Air Policy Commission and the Congressional Aviation Policy Board, indicates that the Board's efforts to achieve its objective have fallen short.

The fact that the Board has developed most of its significant route planning within the framework of individual cases has precluded any considerable amount of over-all planning. Long-range route planning has been considered by some Members, but except in the simpler international route field has not been formulated by the Board. This may be due in part to overzealousness of some members to adhere to the case-by-case system of dealing with route changes. Certainly this should not have prevented the development of standards and criteria which would have served as general guides in subsequent judicial proceedings.

Whether the staff's study now being made of the domestic route pattern will enable the Board to discharge this responsibility more effectively remains to be seen. In any event it appears a step in the direction of what is now needed — not a plan for the future but a careful appraisal of what has been certificated, its cost and significance, and an application to uneconomic units in the present system. It would appear that in this field of long-range over-all planning, the record of the Board shows greatest shortcoming.

#### *Mail Payments*

The Civil Aeronautics Act places no over-all limit upon the annual amount of air mail compensation that may be fixed by the Board for payment to the carriers by the Post Office Department. Section 406 (b) of the Act charges the Board to ascertain operating deficits of certificated carriers, provided they have operated with economy and efficiency, and to compensate for this deficit in the carrier's air mail rate.

Despite current criticism of the feederline experiment and excessive competition among domestic carriers, there is little indication that the Board does not have a keen sense of responsibility to keep individual air mail rates as near the service or value received rate as possible. This attitude, plus inexcusable delays in processing rate proceedings, brought several carriers to the brink of bankruptcy in 1948.

The Board has attempted to develop its air mail rate formulas with a view to encouraging management to reach self-sufficiency. It has endeavored to judge economy and efficiency, but has floundered in insurmountable difficulties in effectively reviewing the record of management and in measuring the comparative efficiency of carriers. Much remains to be done in carrying out this program after too many years indecision.

*Safety*

Safety regulation has not received much attention from most members of the Board. Fortunately the Board began its activities shortly after the Civil Air Regulations had been completely revised and brought up to date in 1937 by the old Bureau of Air Commerce. One of the first steps of the Board was to adopt these regulations in toto as their own and to take over the old Bureau. A year later, when Dr. Warner, an aeronautical engineer, became a member of the Board, he informally assumed direction of the safety regulation functions of the Board during his six years of membership. Mr. Young followed the work of Dr. Warner. Since his resignation in October, 1947, the staff has carried on without substantial direction from Board members.

During the past two years the drafting of detailed regulations has been delegated more and more to the Administrator and such delegation has recently been expressly authorized by Statute. This transfer has run parallel with the mounting increase in economic, route and financial problems confronting the Board since the close of the war. The next logical step for the Board would be to delegate completely to the Administrator the initial responsibility for promulgating Civil Air Regulations, but to reserve the power to pass on objections to his proposed regulations on appeal. The staff of the Board's Bureau of Safety Regulation has always been a small expert group and some such staff would be required by the Board to discharge the suggested appellate jurisdiction.